Supreme Court, U.S.
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No. 01-1069

IN THE

Supreme Court of the United States

A. GRIFFIN,

Petitioner,

v.

CITY OF OPA LOCKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Whether the Court of Appeals, in ignoring the requirements of Rule 49(a), Fed. R. Civ. P., and establishing a new and onerous requirement for special interrogatory verdicts, so far departed from the accepted and usual course of judicial proceedings or issued an opinion in conflict with other decisions of Courts of Appeals as to compel this Court to grant certiorari.

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Rules:

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STATEMENT OF THE CASE

Respondent, City of Opa Locka's Statement of the Case contains a grossly incomplete statement of the facts. To the extent that this Court deems any facts stated therein necessary to a determination of whether jurisdiction should be accepted, Ms. Griffin urges the Court to review the facts of the case as summarized by the Eleventh Circuit Court at App. 3a-7a; 14a-18a; 23a-30a.

ARGUMENT[1]

I. THE COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO ENFORCE THE FEDERAL PROCEDURE ESTABLISHED IN RULE 49(a).

A. It is precisely because the Eleventh Circuit refused to address the applicability of Rule 49(a) that this Court should grant certiorari.

The first argument advanced by the City is that this Court should not grant certiorari because the applicability of Rule 49(a) was not addressed in the opinion of the Eleventh Circuit. The omission of Rule 49(a) from the appellate court's analysis is the precise reason why this Court *should* exercise its supervisory power and grant certiorari. If the circular reasoning of the City is accepted, that would mean that circuit courts can always ignore the Federal Rules of Civil Procedure with impunity. Under the City's theory, if a court simply fails

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1. Ms. Griffin will reply to the City's points in the order raised in the Brief in Opposition.

to mention a rule that it wants to avoid there will be no way of ensuring that the courts follow the rules!

Dennison Manufacturing Co. v. Panduit Corp., 475 U.S. 809 (1986) addressed an analogous situation. The petitioner contended that the appellate court had ignored Fed. R. Civ. P. 52(a) in its review of a trial court decision. It was this failure to expressly consider the case in light of Rule 52(a) that formed the basis for the grant of certiorari. Because the circuit court had not mentioned the rule or its application in its opinion, this Court granted certiorari, vacated the judgment and remanded to the Court of Appeals for further consideration in light of the Rule.[2]

The City cites *Duignan v. United States*, 47 S. Ct. 566, 568 (1927) and *Lawn v. United States*, 78 S. Ct. 311, 324 (1958) for the proposition that only in exceptional circumstances will this Court address an issue that was not raised or addressed below. Neither of those cases address a situation like the one at bar where an issue not addressed by any party or the court at trial, in the appellate briefs or at oral argument, became the *sua sponte* basis for the appellate decision and

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2. Such a remand would be one option in this case. On the other hand, further consideration may be unnecessary. The facts are undisputed as they relate to the City's waiver of entitlement to ask the jury about custom as it relates to the rape. The Eleventh Circuit has already determined that the rape and the workplace harassment constitute "an indivisible, ongoing series of events" and that the rape was a continuation and escalation of the workplace harassment. App. 17a, 21a. And the jury found that the City had a custom of harassment. Accordingly, this Court should grant certiorari, quash the Eleventh Circuit's reversal on this point, and order reinstatement of the judgment against the City for the rape.

was raised and fully briefed on a Petition for Rehearing.[3] Both of those cases deal with situations where a party failed to raise an issue at the trial or appellate level (thereby waiving it) and sought to raise it for the first time in this Court. In *Lawn*, the issue was not even raised in the petition for certiorari. *Id.* at 324 n.16. In *Duignan*, the issue was not raised at any point in the proceedings below and was not included in the assignment of errors. 47 S. Ct. at 568. Clearly, the cited cases are factually inapposite. Furthermore, neither case sought review of an appellate court decision that omitted to consider a rule of procedure that the court was bound to consider.

The appellate court's failure to address and comply with Rule 49(a), rather than being the reason to deny certiorari, is the precise reason that certiorari should be granted.

B. In reversing for failure to have a jury finding on custom as it related to the rape, the Eleventh Circuit established a legal requirement for special verdicts that is inconsistent with Rule 49(a) and therefore conflicts with all of the opinions that follow the rule.

The City next argues that the decision in *Griffin v. Opa Locka* does not conflict with the other decisions that correctly apply Rule 49(a) because the Eleventh Circuit did not address the rule in reaching its decision. This disregards the fact that the *Griffin* opinion reverses for failure to have a jury finding

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3. The City notes that Ms. Griffin did not move for rehearing en banc as if to imply that there is some requirement that such a rehearing be sought before this Court will take a case. Ms. Griffin is aware of no such requirement and the City cites none.

when, under the Rule, a finding for Ms. Griffin is presumed to have been made by the trial court. The opinion on its face establishes a standard for special interrogatory verdicts that is different from the standard established by the rule. It conflicts with Rule 49(a) and it conflicts with any case that correctly applies that rule.

C. The adherence of the Eleventh Circuit to the Federal Rules of Civil Procedure is crucial to the fair administration of justice and the failure to adhere to Rule 49(a) can have far reaching impact on litigation within the circuit.

In its next point the City argues that the impact of the *Griffin* decision is limited to the instant case and does not affect any broader principles of law. A published decision that ignores an established rule of procedure and applies a standard for special verdicts which conflicts with that rule *does* have impact far beyond the case in which it is issued. It has potential to wreak confusion in trial courts with regard to what issues need to be included in special verdicts — or whether such verdicts should be used at all.

Contrary to the City's contention, the opinion in this case does have significant precedential value. It can and will be cited for the proposition that in the Eleventh Circuit, failure to have a special verdict jury finding on a particular issue (even where the trial court entered judgment consistent with a finding on that issue) is ground for reversal. This directly conflicts with Rule 49(a) even though (and especially because) the rule is not mentioned.

D. The verdict form at issue is a special verdict and Rule 49(a) does apply.

In order to avoid the applicability of Rule 49(a), the City makes a tortured effort to call the verdict a General Verdict Accompanied by Interrogatories. If the verdict in this case was such a verdict, then Rule 49(b) rather than 49(a) would apply.[4] However, by its clear language, Rule 49(b) applies only to situations where forms for a general verdict are submitted to the jury along with interrogatories on selected issues of fact. The rule also requires that the court instruct the jury on rendering the general verdict.

A general verdict is one that is returned when the jury is instructed "either verbally or in writing, to make a general finding for the plaintiff or the defendant, ..." *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1058 (3d Cir. 1991). As the Seventh Circuit has explained, "General verdicts simply ask the jury to answer the question 'who won,' and if the winning party is entitled to a monetary award, to answer the question 'how much.' " *Turyna v. Martam Construction Co.*, 83 F.3d 178, 181 (7th Cir. 1996).

The jury was not requested to make any such general finding in this case. No general verdict forms were submitted and no instructions were given on rendering a general verdict. Accordingly Rule 49(b) is inapplicable. The verdict form is reproduced and attached hereto at Reply App. 1ar.

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4. As discussed hypothetically below, if the verdict was rendered under Rule 49(b), there would be no grounds for reversal for failure to have a jury finding on a particular issue.

Calling the verdict at issue a Rule 49(b) verdict really does not help the City and does not justify the reversal for failure to have a jury finding on a particular issue. To apply Rule 49(b) in this case, a general verdict would have to be found to exist. If, hypothetically, a general verdict could be found, there can be no question that it was for Ms. Griffin — every answer on the verdict form was favorable to her. There is no requirement under Rule 49(b) that *all* "essential" issues be addressed by interrogatory. In fact, the Rule expressly gives the court discretion to submit "one or more" issues of fact to the jury by interrogatory. Accordingly, if it was a Rule 49(b) verdict, there would be no requirement to have a jury finding on custom as it relates to the rape, the hypothetical general verdict for Ms. Griffin would stand, and there would be absolutely no basis to reverse for failure to have such a jury finding.

Furthermore, contrary to the City's assertion that the Eleventh Circuit does not refer to the verdict as "special", the opinion does, in fact, refer to the questions asked as "special" interrogatories. App. 7a. This is a clear recognition that the verdict was a special one within the ambit of Rule 49(a). Additionally, the verdict form at issue closely followed the form suggested in the Eleventh Circuit Pattern Jury Instructions (2000) for "*Special* Interrogatories to the Jury". Compare, Pattern Special Interrogatories in § 1.1.3 (nos. 1, [2], 3); § 1.2.2 (no. 1); and § 1.2.3 (no. 1) with Verdict Form at Reply App. 1ar.

There can be no question that the verdict at issue was a special verdict within the meaning of Rule 49(a) and that in ignoring the applicability of Rule 49(a), the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

supervisory power. However, even if it could somehow be found to be a 49(b) verdict, its reversal for failure to have a finding on custom as it relates to the rape was an equally serious departure and merits this Court's attention.

II. MS. GRIFFIN HAS SUFFERED GRAVE INJUSTICE AS A RESULT OF THE DECISION OF THE ELEVENTH CIRCUIT.

The City's final argument in opposition to jurisdiction is that Ms. Griffin has suffered no injustice as a result of the appellate decision that the City would not be liable for the "devastating" injuries she suffered as a result of the rape. Even though the $1,500,000 judgment stands against Neal, that does Ms. Griffin little good. Discovery in aid of execution has revealed that Neal does not have the personal resources to ever satisfy the judgment. On the other hand, the City was covered by insurance and of course has the power to fund the judgment.

Moreover, the jury found that the City had a custom of permitting sexual harassment. It is clear that City officials knew of Neal's sexually predatory interest in Ms. Griffin and looked the other way. App. 26a; 27a-28a n.14. It would be a grave injustice to allow the City to escape liability for an act it could have stopped had it responded appropriately in the face of this direct knowledge. As the Eleventh Circuit concluded, the workplace harassment and the rape "constitute[d] an indivisible, ongoing series of events." App. 17a. Bringing the harassment to a halt would have saved Ms. Griffin the unthinkable injuries she suffered.

This is especially unjust when the only basis for reversal was the appellate court's failure to recognize and apply the

Federal Rules of Civil Procedure. Ms. Griffin has a right to expect the same uniform application of the Federal Rules that other litigants receive. Failure to apply them is an injustice to her and to all who expect the federal courts to be consistent in following their rules of procedure.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the case should be remanded to the Eleventh Circuit with directions to follow the dictates of Rule 49(a) and to affirm the judgment for Ms. Griffin on the issue of custom as it relates to the rape.

Respectfully submitted,

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